the words complained of are not capable of a defamatory meaning stands, I think, on a somewhat different footing, because this depends not upon the evidence but upon my construction of the actual words complained of. I do not, however, express any definite view as to whether or not a submission on the question of libel or no libel can be made without an election by Counsel for the defendants. I will content myself now with expressing the view that the words in paragraph 4 of the letter complained of are, in fact, capable of a defamatory meaning, without saying whether or not in the circumstances of the case they actually constituted a libel. The result is that if Counsel for the defendants now informs me that he does not propose to call any evidence I shall then have to rule one way or the other on the question of whether there was in fact a libel and if so, whether any evidence of malice has been proved. If Counsel does not so inform me I shall not decide these questions until I have heard the whole of the evidence.

Ruling answered.

N.KR. ARUNACHALAM CHETTIAR v. THE MERCANTILE BANK OF INDIA LTD. & FIVE OTHERS.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Briggs, JJ.) February 16, 1952]

[Ipoh — F.M. Civil Appeal No. 27 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11(c).

In 1941 the appellant as attorney of K charged certain lands to the Bank (the 1st respondent); during the Occupation a discharge was obtained from the Japanese Custodian, such discharge being duly registered. Shortly before this the appellant had executed a transfer of the property to purchasers (the 2nd, 3rd, 4th and 5th respondents) but this transfer, although presented, was not registered. Under the Debtor and Creditor (Occupation Period) Ordinance, 1948, the Bank applied by way of an originating summons for revaluation and reinstatement, and joined the other respondents to the appeal. The summons was heard in open Court; the appellant asked for but was refused adjournment; he appeared to take no further part in the proceedings. The Bank's claim was admitted. The purchasers applied for a vesting order, which was made, and the Court further ordered the appellant to pay the costs and to indemnify the purchasers against costs and liability under the reinstated charge.

In allowing the appeal the Court of Appeal commented that procedure by way of originating summons to decide issues raised between the appellant and the purchasers was cumbersome and unsatisfactory.

Briggs, J. held that in an application under section 11(c) of the Debtor and Creditor (Occupation Period) Ordinance, the Court had no jurisdiction to determine the claim of a person to be a bona fide purchaser.

Cases referred to:—

(1) *Cargill v. Bower* 10 Ch. D. 502 at 508.

(2) *Diana Ellis v. Khoo Ek Neo* (1950) M.L.J. 270.

(3) *Fry v. Moore* 23 Q.B.D. 397 at 399.

(4) *Chief Kwame Asante v. Chief Kwame Tawia* (1949) W.N. 40.

COURT OF APPEAL.

S. M. Sharma for the appellant.

H. T. Ong for respondents No. 2, 4, 5 & 6.

Respondents No 1 & 3 not represented.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Pretheroe, Ag. C.J.: — On the 25th day of April, 1941, Arunachalam Chettiar, as attorney of Karuppan Chettiar, charged certain lands with the Mercantile Bank of India Ltd., at Ipoh (hereinafter referred to as the Bank) as security for an overdraft amounting to $8,000. On the 7th June, 1943, Arunachalam Chettiar, as attorney for Karuppan Chettiar, executed an agreement to sell the same lands to four money-lenders (hereinafter referred to as the purchasers) and received the purchase price.

On some date, which is apparently not known, the Japanese Liquidation Officer, acting on behalf of the Japanese Custodian, transferred the benefit of the charge from the Bank to the Custodian as being enemy property. Arunachalam was then required to liquidate the debt forthwith and did so. The discharge was duly registered on the 13th of September, 1943, and Arunachalam delivered the discharge of the charge, together with a memorandum of transfer, to the purchasers. The latter presented the documents for registration, and they were in fact entered in the register, but for some reason unknown to the purchasers the then Registrar omitted to sign the memorial of the transfer.

On a date subsequent to these transactions, but which does not appear on the record Karuppan Chettiar died and Arunachalam Chettiar was appointed Administrator of his estate.

On the 1st October, 1949, the Debtor and Creditor (Occupation Period) Ordinance, 1948, came into operation and the Bank immediately called upon "Karuppan Chettiar" to reinstate the charge in accordance with the provisions of that Ordinance. A long and fruitless correspondance ensued and finally the Bank launched an action. Under section 11(5) of

the Ordinance such action must be either by way of a motion or by way an originating summons and the Bank elected to proceed by way of the latter.

I suppose that an agent of the Bank had inspected the Land Register and discovered that there had been dealings in the land during the occupation period. Be that as it may, the Bank served copies of the originating summons on Arunachalam Chettiar, as Administrator of the estate of Karuppan Chettiar (deceased); the four purchasers and on one other person. The position of this latter person must now be explained. One of the purchasers (Alagappa Chettiar) had sold his share in the land to Sithambaram Chettiar who had since died. The originating summons was served on the latter's executor (Muthuraman Chettiar). It was common ground at the trial that Alagappa Chettiar had no interest in the case and consequently he was not served with a copy of the notice of appeal.

On the 23rd January, 1951, one of the purchasers filed an affidavit in reply to the affidavit filed by the Bank. That affidavit sets out certain facts, one of which is that the land purchased by them comprised other plots of land besides the subject matter of this appeal. It then goes on to make certain claims against Arunachalam Chettiar. The other purchasers also filed affidavits stating that they agreed with the facts set out and the claim made in the last mentioned affidavit.

It was not until the 12th April, 1951, that Arunachalam Chettiar filed an affidavit and only then apparently in response to an Order made by the Court. In this he stated that he did not oppose the application made by the Bank but that he did oppose the claims made by the purchasers. He alleged that the latter were "not *bona fide* purchasers for value" but did not state any facts in support of this contention.

Next the purchasers filed further affidavits which alleged that the land had been sold to them free of all encumbrances but nevertheless they did not challenge the application by the Bank.

The summons came before the learned Judge in Chambers and was adjourned into open court. When the summons was called in open court Mr. Chan, as counsel for Arunachalam Chettiar, asked for a short adjournment as he had only just been briefed. That application was refused and the hearing continued though neither Mr. Chan nor his client appear to have taken any further part in the proceedings.

Mr. Ong, on behalf of the four purchasers, first admitted the claim by the Bank and then proceeded to ask for a vesting order under section 45 of the Trustee Ordinance; for an indemnity against Arunachalam Chettiar and for costs. In his order the learned trial Judge granted the application of the Bank, and he also directed that the vesting order be made in favour of the four purchasers. He also ordered that Arunachalam Chettiar should pay the bank its costs, and that the four purchasers should be indemnified out of the assets of the Estate of Karuppan Chettiar, deceased, to the extent of those costs. He further ordered that Arunachalam Chettiar should pay the four purchasers the costs of and in connection with the application. Against this order Arunachalam Chettiar entered an appeal. He joined as respondents the Mercantile Bank of India Ltd., and all the parties who had been respondents with him in the original application. He only appealed against those paragraphs of the Order which related to the four purchasers who became the 2nd, 4th, 5th and 6th respondents in the appeal. The main ground of appeal was that the issues between appellant and the 2nd, 4th, 5th and 6th respondents had never been tried.

From the foregoing outline of the progress of the complicated litigation it is abundantly clear that the original application by the Bank was never opposed by any party to the litigation. It is equally clear that procedure by way of originating summons to decide the issues raised between Arunachalam Chettiar and the four purchasers was about the most cumbersome and unsatisfactory that could be devised. In the event, the affidavits filed do not contain a number of facts which must, in my opinion, be known before a decision can be made. Before a vesting order could be properly made the nature of the original transactions must be known, the more so in view of the suspicious circumstances that the memorial of the transfer was never signed. I agree that it is a point in favour of the respondents that neither the appellant nor his counsel exercised their right to cross-examine the purchasers as deponents to their affidavits. But I doubt if such examination could have been satisfactory in any case because of the remarkable change in status of Arunachalam Chettiar as the litigation progressed.

He started as the 1st respondent to an application made by the Bank that a charge, made by himself, should be reinstated. He ended by being virtually the defendant in an action by the four purchasers where the actual title to the land was in issue. Had the numerous affidavits filed afforded all the necessary evidence it might have been possible to arrive at a decision regarding the ownership but in fact there are many glaring omissions. Doubtless more evidence would have been forthcoming had the appellant, or his counsel, exercised his right to cross-examine the

purchasers but even if he had done so his own case would not have been fully before the court as his own affidavits were incomplete concerning the eleventh hour issue regarding ownership. As I view this case there was nothing that appellant could do, once the application had been adjourned into Court, to get his presentation of facts regarding the sale before the Judge. I agree with the appellant therefore that the issue regarding the sale has not been satisfactorily tried and that the course the proceedings took (apart altogether from appellant's omission to cross-examine the deponents) was such as gravely to embarrass the the appellant in the presentation of his case.

For this reason I would allow this appeal. I would direct that the order of the Court below should be varied by expunging paragraphs 11, 12, 14 and 15 without prejudice to any rights which may be vested in the 2nd, 4th, 5th and 6th respondents. The appellant should have the costs of this appeal as against the 2nd, 4th, 5th and 6th respondents. There will be no costs for or against the 2nd, 4th, 5th and 6th respondents in the Court below. There was no appeal against paragraph 13 of the order made in the lower Court so that paragraph stands confirmed. The $500 deposited in Court should be paid out to the appellant or his solicitor.

Thomson, J. : — I have had the advantage of reading the Judgments of the learned President and of my brother Briggs. I am in agreement with the conclusions at which they have arrived. I have, however, arrived at these conclusions by a somewhat different process of reasoning which I shall proceed to state as briefly as possible.

Before doing so, I would, with great respect, make it clear that I am expressing no view one way or the other as to what is about to be said by my brother Briggs on the questions of jurisdiction. Determination of that question calls for a consideration of a number of points of very great difficulty and as I do not for myself find a determination of it to be necessary for the purpose of disposing of the appeal, I expressly refrain from saying anything that might connote either agreement or disagreement on my part with the views so clearly and persuasively stated by my brother.

The course of the litigation is sufficiently set out in the judgment which has just been delivered by the learned President, and it is not necessary to recapitulate that course here. I would observe, however, that most of the difficulty and confusion which have attended the case result from the most unfortunate local procedure in accordance with which such cases are normally commenced by way of originating summons, a form of proceeding which is singularly inappropriate to any case where there is a prayer for specific relief of any sort. One of the many objections to such a form of procedure is that it obviates the use of pleadings and so the cases of the respective parties can only be ascertained and defined by reference to the affidavits filed by them.

In this appeal we are not concerned with the case of the original applicant, the Mercantile Bank of India. What we are concerned with is the rights of the original respondents as among themselves and in particulars as between the present appellant and the other original respondents other than the third original respondents, to whom I shall henceforth refer as the respondents, and *in limine* it is necessary to ask what relief the respondents actually asked for as against the appellant. The answer to that question, in the absence of pleadings, is to be found in the affidavit of the respondent Ramasamy Chettiar dated 23rd January, 1951, which concluded with alternative prayers that the present appellant be ordered to pay to the original applicant the balance still remaining due under the charge which formed the subject matter of the proceedings or that alternatively, in certain circumstances which it is not necessary to set out in detail, he should be ordered to execute charges in favour of the respondent on certain other land in Kuala Kangsar and in Larut belonging to the estate of the deceased which was in no way affected by the original charge of the Mercantile Bank which was only in respect of the land comprised in Certificate of Title No. 9082 for Lot No. 685 in the Town of Ipoh. In the event, what the respondents got, and what is the principal subject of complaint in the present appeal, was a vesting order in their favour in respect of the Ipoh land comprised in Certificate of Title No. 9082.

Throughout the entire proceedings there had not been the slightest suggestion that the repondents were asking for any relief whatsoever touching in any way the land comprised in Certificate of Title No. 9082 until at the very end of the brief trial, Counsel for the respondents intimated that he would "only" ask for a vesting order under section 45 of the Trustee Ordinance presumably, though he did not say so in terms, in respect of the land in question. Such an order was forthwith granted and forms the subject matter of paragraph 11 of the formal order that was subsequently drawn up which is the principal part of that order now appealed against.

The respondents thus at the last moment asked for and were given relief which they did not ask for, and which was indeed inconsistent with the relief they

did ask for in the affidavit of Ramasamy Chettiar which was the only statement the appellant ever had of the case he had to meet and of the relief which was claimed against him. That affidavit did not even contain a prayer for further relief than that asked for in terms and even if it had done so it would not have assisted the respondents for as was said by Fry, J. in *Cargill v. Bower*[1] :—

> "Such a prayer must always be limited by two things — the facts which are alleged and the relief which is expressly asked. You cannot under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for."

In view of section 11(5) of the Debtor and Creditor (Occupation Period) Ordinance, I am not saying that it was not open to the respondents to ask that the Kuala Kangsar and Larut lands should be charged in their favour for certain sums but to obtain a vesting order in respect of the Ipoh land went far beyond the scope of any such prayer.

The vesting order which is contained in paragraph 11 of the order appealed against cannot, accordingly, stand and neither by parity of reasoning can the 12th and 13th paragraphs which give indemnities out of the estate of the deceased to the respondent which were never asked for. Nor in the circumstances can paragraph 15 which deals with the question of costs.

I would allow the appeal and concur in the order proposed by the learned President.

Briggs, J. : —The appellant is the administrator of one Karuppan, who was formerly the registered proprietor of certain land in Perak which was charged before the occupation to the 1st respondents. During the occupation the Japanese treated the 1st respondents as an enemy corporation and collected their assets through the Custodian of Enemy Property. On or before 12th August, 1943, Karuppan's attorney paid to the Custodian the amount outstanding on the charge and on that date the Custodian executed a discharge which was registered on 13th September, 1943. Duress was orginally alleged, but was not proved, and revaluation and reinstatement of the security were accordingly ordered. Against this, there is no appeal by any party. Karuppan died some time before these proceedings were launched.

On 17th June, 1943, Karuppan, by his attorney, executed a transfer of the land to the 2nd, 3rd, 4th and 5th respondents in equal shares at a price of $28,250 (Japanese currency). The transfer is in standard form and was expressed to be "subject to the . . . . . charges . . . . stated in the document of title thereto . . ." This transfer was presented for registration on or before the 13th September, 1943, but has never been registered and could not now be registered for various technical reasons. In March, 1950, the 3rd respondent sold his share in the land to the 6th respondent and executed a transfer thereof, but this transfer has naturally also not been registered.

The Bank joined the 2nd to 6th respondents inclusive on its application for revaluation, presumably under the terms of paragraph (c) of section 11(5) of the Ordinance. Paragraph (b) is not, I think, applicable, since it applies only to holders of registered interests, or at least persons whose interests appear on the register. A caveator might be covered, but these respondents had not imposed a caveat. Apart from the orders for revaluation and reinstatement, the Bank did not apply for anything further, but Mr. Ong, for the 2nd, 4th, 5th and 6th respondents asked for a "vesting Order under section 45 of the Trustee Ordinance and for indemnity and for costs too." Immediately after these words in the Judge's note there follows his note of his order, which included, in paragraph 11, an order vesting the land, subject to the reinstated charge, in Mr. Ong's clients and directing memorials in the register accordingly; in paragraph 12, a declaration that they are entitled to be indemnified by the estate of Karuppan against their liability on the charge; in paragraph 14, a similar declaration of indemnity as to costs payable by them; and in paragraph 15, an order that the appellant personally should pay their costs of the application. Against these four paragraphs of the order the appellant appeals. The 1st and 3rd respondents were not served with the proceedings and the matter lies strictly between the appellant and Mr. Ong's clients.

The first question which arises is one of jurisdiction. Had the learned trial Judge jurisdiction to make such an order in these proceedings? I do not think he had. I think the whole purpose of sub-section (5) of section 11 of the Ordinance is to enable the proper order to be made when some registered interest in land, or possibly a caveat to protect some unregistered interest, would otherwise intervene and prevent this. It may be that some types of case lie outside these limits; but I do not think the section can be stretched so far as to include this case. There is no reason why it should. For the essential purposes of the Ordinance it was wholly unnecessary that the learned trial Judge should consider the issues which the respondents raised here. The rights of the respondents, whatever they might be, lay in contract only, and would in no way be prejudiced by any order of the Court, though the Order might make it more difficult to enforce them. I think the power of

Court to "determine the claim of any person to be a *bona fide* purchaser or chargee . . ." arises only when the rights or status in question appear from the register, not when they rest only in contract. The case of *Diana Ellis v. Khoo Ek Neo*[2], is not, I think, authority opposed to this view. The interests there involved were interests appearing on the Register.

I concede that this is only a case of irregular assumption of jurisdiction, and not of absolute want of jurisdiction. There is no doubt that in other and proper proceedings the learned trial Judge might have made an order similar to the parts of this order appealed from. In such cases the irregularity, although involving in one sense a question of jurisdiction, can be waived either expressly or by taking any such step in the proceeding as fairly indicates an acceptance of the view that jurisdiction exists; but I am unable to find that there was any waiver in this case. The first step which the appellant took in the proceedings was merely to appear. An unconditional appearance cannot amount to waiver in Perak, since a conditional appearance is not allowed there. In any event it presumably took place before there was any hint of impropriety in the proceedings. That first arose on the affidavit of R. M. Ramasamy Chettiar sworn on the 23rd January, 1951. In his affidavit in reply to this dated 12th April the appellant stated, "I contend that the respondents Nos. 2, 4, 5 and 6 are not entitled to any of the relief as set out in paragraph 12 (of the affidavit in question)". It is true that the grounds he gave for this were limited to grounds of fact; but matters of law should not be included in affidavits. It was by no means certain then that he did not intend to take the point of jurisdiction. He could certainly have done so on that affidavit. If therefore there was a waiver, it arose from something which occurred at the hearing on 18th April, 1951. At the hearing Counsel for the appellant applied for a short adjournment. Neither he nor the appellant took any other part in the proceedings whatever, so far as appears from the note or grounds of judgment of the learned trial Judge. He had made in his affidavit his protest against the irregular attempt to obtain this relief. He never withdrew that protest either expressly or by implication. The application for adjournment is not necessarily referable to the irregular portion of the proceedings: nor is it a step in the proceedings analogous to one which is "so inconsistent with the notion that no action is in existence as to amount to a waiver of the irregularity in the procedure." (*Per* Lindley L.J. in *Fry v. Moore*[3]). In this case the proceedings were in part regular, and if waiver by means of a step taken in the proceedings is alleged, that step must, I think, be shown to be clearly and exclusively referable to that part of the proceedings which was irregular. Mere appearance in Court on the 18th April could not be such a step. Acquiescence may in many other cases amount to waiver, but I think there cannot be a waiver of want of jurisdiction by mere inaction. It is *prima facie* the duty of an appellate Court to check all cases of excess of jurisdiction. *Chief Kwame Asante v. Chief Kwame Tawia*[4]. I think cases of irregular assumption of jurisdiction *prima facie* within the principle and, if waiver is in any case a sufficient answer, it must be established by the party alleging it and, if not proved, will not be presumed. If in this case the applellant had been heard on the merits of the respondents's application, his argument would no doubt have constituted a waiver, if he had not at the same time taken the point of jurisdiction. But it does not appear that he was ever heard at all. I think that no waiver of the want of jurisdiction has been established and I think this Court should take the point now. Although Counsel for the appellant did not take it in the first place, he adopted it gratefully when the Court raised the matter. I would allow the appeal on this ground alone.

The second question is whether the part of the order appealed from was properly made in the circumstances. Mr. Ong's clients had clearly set out that they desired this order to be made. See the 4th respondent's affidavit of 23rd January, 1951. The appellant made it equally clear in his affidavit of 12th April, 1951, that he objected, and gave grounds involving disputed questions of fact. The matter was adjourned into Court for hearing — presumably for an issue to be tried, or at least for cross-examination on affidavits, and perhaps other oral evidence. Difficult questions of law and fact were involved, yet there is no record that the appellant was ever heard on any of them. It is nowhere stated that he had nothing to say, and I think that exceedingly unlikely. For example, was the original sale made "free from encumbrances" or not? The discharge having been registered, was not the contract to sell "free from encumbrances" (if such it was) duly performed? Do "encumbrances", within the meaning of the implied term of the contract, include a statutory obligation such as is now created, or are they limited to encumbrances created by the transferor or extant at the time of the agreement? When was the purchase money paid or "advanced"? Was this an agreement of which specific performance could have been ordered? I offer no answer to any of these questions, but I suggest

that they required consideration and I do not think they received it. I am further of opinion that, even if there was jurisdiction to decide such matters in these proceedings, it was highly undesirable, and the Court should have refused, to do so. The proper remedy, if any, of the respondents was by action for specific performance. Rights as between them and the appellant arising from the reinstated charge could properly be settled in that action.

I think this appeal should be allowed, and concur in the order proposed by the learned President.

Appeal allowed.

FOOK LEE TIN MINING KONGSI v. GURDEV SINGH.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Briggs, JJ.) February 16, 1952]

[Ipoh — F.M. — Civil Appeal No. 46 of 1951]

Promissory Note — Bills of Sale Ordinance, ss. 6 and 8 — Evidence Ordinance, 1950, s. 91 — Loan to a partner of a firm.

The plaintiff-respondent sued on a document executed by the managing partner of the defendants-appellants in the following terms:

23rd August, 1950.

"ON DEMAND I, the undersigned Choi Poh the managing partner of Fook Lee Tin Mining Kongsi, Malim Nawar, promise to pay Gurdev Singh or order the sum of Dollars Four thousand only for value received in cash with interest thereon at the rate of $3 per every hundred dollars per mensem.

As security for the above loan I do hereby give my one 130 H.P. Fairbank-Morse Oil Engine No. 730499 two cylinder.

FOOK LEE MINING KONGSI,
(Sd.) (In Chinese)
Manager."

Held, that whatever the intentions of the party the document was a bill of sale and as it was not registered as such it was void; but the fact that the bill of sale was void did not extinguish the debt.

Cases referred to:—

(1) *Bradford Advance Co. Ltd. v. Ayers & Wife* (1924) W.N. 152.

(2) *Davis v. Rees* 17 Q.B.D. 408.

COURT OF APPEAL.

H. T. Ong for the appellants.

S. M. Sharma for the respondent.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Pretheroe, Ag. C.J.: — The defendants in this case are a mining partnership of which one Choi Poh was at all material times, but is no longer, the managing partner.

On 23rd August, 1950, the plaintiff paid to Choi Poh the sum of $4,000 and on the same day Choi Poh executed a document in the following terms:—

23rd August, 1950.

"ON DEMAND I, the undersigned Choi Poh the managing partner of Fook Lee Tin Mining Kongsi, Malim Nawar, promise to pay to Gurdev Singh or order the sum of Dollars Four thousand only for value received in cash with interest thereon at the rate of $3 per every hundred dollars per mensem.

As security for the above loan I do hereby give my one 130 H.P. Fairbank-Morse Oil Engine No. 730499 two cylinder.

FOOK LEE MINING KONGSI,
(Sd.) (In Chinese)
Manager."

This sum of $4,000 has never been repaid and on 9th January, 1951, the plaintiff commenced proceedings against the present appellants as defendants for its recovery. In view of the subsequent course of the matter, it is desirable to consider the nature of these proceedings in some detail.

In his plaint, the plaintiff stated that on 23rd August, 1950, "the defendants . . . borrowed from the plaintiff . . . the sum of $4,000 and on the same day executed a promissory note in favour of the plaintiff." The promissory note in question was the document which has already been quoted. He then proceeded to claim the sum of $4,000 and interest on that sum at the rate of 3% per mensem from 23rd August, 1950, until date of judgment.

The defence was two-fold. In the first place, it was said that the defendants never borrowed any sum of money from the plaintiff, that the loan of $4,000 was given by the plaintiff to Choi Poh personally and that Choi Poh never had any authority of any sort to borrow money on behalf of the partnership. In the second place, it was said that the document executed by Choi Poh was a bill of sale and was void by reason of never having been registered and not being made in the form prescribed by law.

The matter came on for trial in due course before Hill, J. who found that the money in question was a loan by the plaintiff to the defendants and that the document exhibited to the plaint, which had been admitted in evidence without any objection to its admissibility having been raised by counsel for the defendants, was a promissory note and not a bill of sale. He accordingly gave judgment for the plaintiff